

CHAN CHOR SHUH*a***v.****PP**

COURT OF APPEAL, KUALA LUMPUR

b

MOKHTAR SIDIN JCA

ABDUL KADIR SULAIMAN JCA

PAJAN SINGH GILL JCA

[CRIMINAL APPEAL NO: C-05-45-96]

16 JANUARY 2003

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EVIDENCE: Adverse inference - Whether presumption arose - Non-production of prosecution witness - Whether witness a police informer - Whether to be accorded protection under s. 40 of Dangerous Drugs Act 1952

CRIMINAL LAW: Dangerous drugs - Section 39B(1)(a) - Trafficking in dangerous drug - Presumption - Whether trial judge erred in invoking double presumption test

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The accused was convicted by the High Court under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking a total of 36.72 grams superfluous of heroin and monoacetylmorphine and sentenced to death under s. 39B(2). This was an appeal against his conviction and sentence.

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The defence argued that the prosecution should have produced one Wong Lou Kat, who was present at the time of the arrest of the accused by the police. The prosecution contended that he was a police informer and was therefore accorded protection under s. 40 of the Act. The defence however considered the role played by Wong in the chain of events which led to the arrest of the accused was more than that of an informer, *ie* that of an agent provocateur.

*f***Held:****Per Pajan Singh Gill JCA***g*

[1] The High Court decision was handed down in 1996, *ie* before the Federal Court case of *Muhammed Hassan v. PP* which had held that it was wrong to rely on a presumption of possession of a dangerous drug under s. 37(d) of the Act, to raise a presumption of trafficking of the drug in question. In the present appeal, the trial judge, in hindsight, had erred in invoking the double presumption test. (p 504 c)

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[2] Even though there was a paucity of evidence as to whether Wong was an agent provocateur, in view of the role he had played in the facts of the case he should have been produced as a prosecution witness, or at least

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- a* offered to the defence. This was not a case where the police had acted individually on the tip-off by an informer but the parties had acted in concert in effecting the arrest of the accused. Wong had been present at the material time and was in dialogue with the accused prior to the arrest. The trial judge had wrongly rejected the need to call Wong by relying on the premise that he was an informer. (p 508 b-f)
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- [3] The trial judge had also wrongly rejected the importance of the fact as to who had actually effected the arrest of the accused. There were doubts as to whether it was carried out by ASP Luthfi or one PC Yap. The fact that PC Yap was not called as a witness by the prosecution but merely offered to the defence had a material effect on the prosecution's case. (p 509 c)
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- [4] The evidence in toto led by the prosecution left too many questions unanswered, especially regarding the role of Wong as the alleged informer. (p 509 d)
- d*

[Appeal against conviction allowed.]

[Bahasa Malaysia Translation Of Headnotes]

- e* Tertuduh disabitkan oleh Mahkamah Tinggi di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') kerana mengedar sejumlah 36.72 gram heroin dan monoacetylmorphine dan dihukum mati di bawah s. 39B(2). Ini adalah rayuan terhadap sabitan dan hukumannya.

- f* Pihak pembela menghujah bahawa pihak pendakwa seharusnya mengemukakan seorang bernama Wong Lou Kat, yang hadir semasa penangkapan tertuduh oleh polis. Pendakwa menghujah bahawa beliau adalah seorang pemberi maklumat dan seharusnya diberi perlindungan di bawah s. 40 Akta. Walau bagaimanapun, pembela beranggapan bahawa peranan yang dimainkan oleh Wong dalam rentetan yang membawa kepada penangkapan tertuduh adalah lebih dari yang dimainkan oleh seorang pemberi maklumat, yakni ia merupakan seorang agen provokatur.
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Diputuskan:

Oleh Pajan Singh Gill HMR

- h* [1] Keputusan Mahkamah Tinggi telah diberi dalam tahun 1996, iaitu sebelum kes Mahkamah Persekutuan *Muhammed Hassan lwn. PP* yang mendapati bahawa adalah salah untuk bergantung kepada anggapan milikan dadah berbahaya di bawah s. 37(d) Akta, untuk membangkitkan anggapan mengedar dadah berkenaan. Dalam rayuan ini, hakim perbicaraan, dalam imbasan, telah tersilap dalam menggunapakai ujian anggapan berganda.

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- [2] Walaupun tidak terdapat bukti yang kuat samada Wong adalah seorang agen provokatur, melihat kepada peranan yang dimainkan olehnya melalui fakta kes dia sepatutnya dikemukakan sebagai saksi pendakwa, atau sekurang-kurangnya diberi kepada pembela. Ini bukanlah suatu kes di mana pihak polis telah bertindak dengan sendiri atas sumber yang diberi oleh pemberi maklumat tetapi mereka telah bertindak melalui perancangan serentak dalam penangkapan tertuduh. Wong telah hadir pada masa berkenaan dan sedang berhubung dengan tertuduh sebelum penangkapannya. Hakim perbicaraan dengan silapnya menolak keperluan untuk memanggil Wong dengan bergantung pada alasan bahawa dia seorang pemberi maklumat. a
- [3] Hakim perbicaraan juga tersilap dalam menolak kepentingan fakta identiti pihak yang sebenarnya telah menangkap tertuduh. Terdapat keraguan samada ia telah dilakukan oleh ASP Luthfi atau PC Yap. Fakta bahawa PC Yap tidak dipanggil sebagai saksi oleh pihak pendakwa tetapi sebaliknya hanya diberi kepada pembela mempunyai kesan material terhadap kes pendakwa. b
- [4] Keseluruhan bukti yang dihadapkan oleh pendakwa meninggalkan banyak persoalan yang tidak terjawab, lebih-lebih lagi mengenai peranan yang dimainkan oleh Wong sebagai pemberi maklumat. c
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[Rayuan terhadap sabitan dibenarkan.]

Cases(s) referred to:

Mohamad Radhi bin Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 (*refd*)

Muhammed Hassan v. PP [1998] 2 CLJ 170 (*fol*)

Ong Ah Too v. R [1955] MLJ 247 (*refd*) f

R v. Porrit [1961] 45 Cr App R 348 (*refd*)

Legislation referred to:

Courts of Judicature Act 1964, s. 60

Dangerous Drugs Act 1952, ss. 37(d), 39B(1)(a), 39(B)(2), 40 g

For the appellant - Karpal Singh (Gobind Deo Singh); M/s Karpal Singh & Co

For the respondent - Kamarul Hisham Kamaruddin; AG's Chambers

[Appeal from High Court, Kuantan; Criminal Trial No: 47-1-95]

Reported by M Maheswaran h

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*a***JUDGMENT****Pajan Singh Gill JCA:**

b The appellant, Chan Chor Shuh was charged with an offence of trafficking a total of 36.72 grammes in weight of heroin and monoacetylmorphine on 7 January 1994 in contravention of s. 39B(1)(a) punishable under s. 39B(2) of the Dangerous Drugs Act 1952. The High Court at Kuantan convicted him, and sentenced him to death. We allowed the appeal and quashed the conviction. We now give our reasons.

c The decision in this case was given in 1996 well before the Federal Court case of *Muhammed Hassan v. PP* [1998] 2 CLJ 170, which decided in 1997, that it was wrong to rely on a presumption of possession of a dangerous drug under s. 37(d) of the Act, to raise a presumption of trafficking, of the drug in question. In the instant case the learned trial judge in hindsight was wrong in invoking a “double presumption” test.

d The other grave infirmity in the judgment was the learned trial judge’s treatment of the defence case especially in the context of the role of the informer in the unfolding of the prosecution narrative.

e The facts showed that acting on information a party of police personnel led by ASP Mohd. Luthfi Ismail bin Abdullah (SP5), and seven others proceeded to a road junction between Sg. Lembing and Paramount Garden. The informer was also a member of the party and travelled in ASP Luthfi’s car.

f On arrival at Jalan Paramount, the said informer pointed to a car that was parked on the left hand side of Jalan Paramount facing towards Sg. Lembing, ASP Luthfi immediately stopped his car in front of the said car, got down, and walked towards the car. On reaching the car he proceeded to open the door of the car, and found that the engine of the car was still on. ASP Luthfi introduced himself to the driver of the car, who was incidentally the appellant. He then turned off the engine of the car. The appellant was seated at that point of time at the driver’s seat of the car. ASP Luthfi then noted a red plastic package, on the passenger’s seat of the car next to the appellant, and proceeded to remove it. The appellant was brought out of the car with some resistance.

g On examining the package, ASP Luthfi noticed that there was a further white package wrapped within it, and the white package contained powdery substance which was suspected to be heroin. After seizing this package, and detaining the appellant, he returned to the police station. The powdery substance was sent to the chemist, for chemical analysis, and it was found to be heroin weighing 6.51 grammes and monoacetylmorphine weighing 30.21 grammes.

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It was also discovered that the said car, registration no. CAD 3199, driven by the appellant at the material time was actually a hired car. The hirer one Encik Mohd. Moor had in his evidence stated that the appellant had hired the said car for a period of two days on 5 January 1994. However, the car was not returned, and on the 8 January 1994, Encik Mohd. Moor received a telephone call from the appellant informing him that he wanted to extend the period of time for another day. On 9 January 1994, Encik Mohd Noor received information that the said car was detained in Kuantan. He categorically denied that there was any package left in the car at the time the appellant hired the said car.

In the course of the trial, and the appeal, the main plank of argument of the defence was the role played by the informer in the said raid carried out by the police leading to the arrest of the appellant, and whether the protection of s. 40 of the Dangerous Drugs Act should have been accorded to him. We shall deal with the issue presently.

Informer or agent provocateur?

From the evidence garnered at the trial, we find there was a visible presence of an informer, who according to the arresting officer was with him at the time of the arrest, and travelled in the same car as the arresting officer when the arrest was made. However, the prosecution neither called, nor made the said informer available, having relied on s. 40 of the Act. It was the argument of the prosecution, that since the informer had not played a role in the transaction it did not deprive him of the protection afforded by s. 40 of the Act. We wish to interject here to say, that it is an established fact that no transaction took place in the factual matrix of this case. The defence, however, contended that the informer was an agent provocateur, and was someone that the appellant knew as Wong Lou Kat and in fact had according to the defence brought the appellant to Kemaman, Trengganu, to hire the said car. At the material time, on the night in question of appellant's arrest, the appellant had arranged to meet with the said Wong Lou Kat, in order to return the hired car. They had planned to meet by a road near a temple, and Wong Lou Kat had promised to be there in 15 minutes.

On arrival at the said rendezvous, the appellant had seen the said Wong Lou Kat arrive in a car. The appellant tried to signal to him to stop, instead Wong Lou Kat turned into a side road. The appellant followed, after him, overtook him, and pulled up in front of him. He then approached Wong Lou Kat's car, and on opening the door of the car was detained by Yap, a police personnel. The appellant stated that ASP Luthfi was not anywhere in sight, and arrived later. The appellant stated that the police personnel combed the area, and chanced upon a package near the temple, that he was not aware of.

- a* From the submissions in the trial court, and before us, it is evident that the defence was of the view that the said Wong Lou Kat took on a role of more than an informer, and was integral to this prosecution case, as he was known to the appellant, and in fact had undisputed dealing with the appellant, in respect of the hiring of the said car, and subsequently the rendezvous, which was when
- b* the arrest took place.

- c* It was the submission of the defence before us, and the court below, that the prosecution was thus obliged to produce Wong Lou Kat as a witness of the narrative, or at the very least, to offer him to the defence. Since neither course was adopted, the defence contended that an adverse inference should be drawn against the prosecution.

The trial judge did not accede to this course of submission of the defence, and had this to say about it in his grounds of judgment:

- d* Jika diperhatikan ujian yang dinyatakan di dalam kes itu ialah samada kegagalan pendakwa memanggil seseorang saksi itu boleh menyebabkan terdapatnya kelompangan di dalam kes pendakwa dan dengan itu pihak pendakwa dikatakan gagal membuktikan kesnya tanpa keraguan yang munasabah. Dalam hubungan ini, perlu dinyatakan bahawa setiap kes bergantung kepada faktanya sendiri. Berbalik kepada kes kita ini, bolehkah
- e* dikatakan terdapat kelompangan sedemikian tanpa kehadiran apa yang dirujuk sebagai “sumber” untuk memberi keterangan bagi pihak pendakwa atau disediakan untuk disoalbalas oleh pihak pendakwa. Saya berpendapat untuk memutuskan persoalan ini kita perlu mengambilkira fakta yang terdapat dalam kes ini dan melihat sejauh manakah peranan yang dimainkan oleh “sumber”
- f* di dalam membawa kepada tertangkapnya tertuduh. Apa yang dapat dilihat di dalam kes ini “sumber” ialah orang yang telah membawa pasukan polis ke tempat di mana kereta tertuduh dengan tertuduh di dalamnya telah dijumpai. Selain itu kereta “sumber” telah digunakan oleh pihak polis di dalam operasi yang telah dijalankan. Tidak ada keterangan yang menunjukkan bahawa “sumber” telah bertanggungjawab menyebabkan atau menarik (entice) tertuduh untuk melakukan kesalahan itu. Lagipun di dalam keadaan kes ini
- g* tidak ada keterangan yang menunjukkan bahawa “sumber” telah bertukar menjadi ejen provokatur dan dengan itu menyebabkan dia hilang perlindungan yang diberikan kepadanya di bawah s. 40 Akta. Juga tidak ada keterangan yang menunjukkan bahawa “sumber” lah yang telah meminta tertuduh membawa dadah itu ke tempat yang berkenaan itu. Tanpa keterangan sedemikian, saya berpendapat “sumber” di dalam kes ini masih boleh
- h* berlandung di bawah s. 40 Akta dan kegagalan pihak pendakwa memanggilnya untuk memberi keterangan atau menyediakannya untuk disoalbalas oleh pihak pembela tidak sekali-kali boleh menjejaskan kes pihak pendakwa. Peranan yang dimainkan oleh “sumber”, di dalam kes ini adalah jauh berbeza daripada peranan yang dimainkan oleh pemberi maklumat di dalam kes *Ti Chuee Hiang v. PP* (di atas). Izinkan saya mengulangi bahawa setiap kes bergantung kepada
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fakta masing-masing. Dengan itu saya menolak hujah peguambela yang mendesak Mahkamah untuk memakai s. 114(g) Akta Keterangan terhadap pihak pendakwa. Sepertimana kata Mohamed Azmi HMA di dalam kes *Munusamy v. PP* [1987] 1 MLJ 492 di m.s. 494:

In our opinion whether a person is an informer or has become an active agent provocateur would depend on the facts of each particular case. In the instant case the protection under s. 40(1) clearly applies since the evidence showed that all the informer did was to accompany DPC Lian on the 14th and introduce him to the appellant. Accordingly there is no merit in the argument that the learned judge ought to have invoked the adverse presumption under s. 114(g).

Dengan hormatnya, saya berpendapat kata-kata YA Mohamed Azmi adalah terpakai di dalam keadaan kes ini. Di dalam alasan yang dinyatakan itu saya dengan hormatnya menolak penghujahan peguambela supaya mahkamah membuat anggapan bertentangan di bawah s. 114(g) Akta Keterangan terhadap pendakwa.

In the context of the present case, a matter of concern to us, was whether the trial judge's treatment of the evidence of the appellant in the context of the role of Wong Lou Kat amounted to a legitimate treatment. The law requires a trial judge to consider all of the evidence that has been adduced in support of the defence. A court must consider carefully whether a defence put forward is capable of raising a reasonable doubt in the prosecution's case. As Mohamed Azmi SCJ stated in *Mohamad Radhi bin Yaakob v. PP* [1991] 3 CLJ 2073; ([1991] 1 CLJ (Rep) 311) at p. 2076 (p. 315):

We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution's case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v. PP* [1963] MLJ 263 go one step further before convicting the accused by given due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt in the prosecution case. Thus, even though a judge does not accept or believe the accused's explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt in the prosecution case.

In a suitable case it has been known that a court must consider a defence even it has not been specifically raised. As Ashworth J stated in *R v. Porrit* [1961] 45 Cr App R 348 at p. 356:

As has already been said, the issue of manslaughter was not raised at the trial, but there is ample authority for the view that notwithstanding the fact that a particular issue is not raised by the defence, it is incumbent upon the judge trying the case, if the evidence justifies it, to leave such issue to the jury.

- a* It is a salutary rule of law that the failure to consider a possible legal defence is a miscarriage of justice (see *Ong Ah Too v. R* [1955] MLJ 247).

- b* We are, on reflection, not in total agreement with the learned judge on this aspect, on his treatment of the defence, especially in respect of the role of Wong Lou Kat. Even though there is a paucity of evidence whether the said Wong Lou Kat was an agent provocateur, we felt in view of the role he played in both the prosecution and defence version, he should have been produced as a prosecution witness, or at the least offered to the defence. The undisputed facts remain that the said Wong Lou Kat was present at the time of the arrest, and equally there was communication between him and the appellant, prior to
- c* appellant's arrest. In fact he arranged the rendezvous with the appellant in order to accompany the appellant to return the hired car.

- d* A distinct possibility that was not considered by the trial judge was the fact that there could have been a pre-arrangement between the appellant and the said Wong Lou Kat about a pick-up, at the rendezvous, suggested by the said Wong Lou Kat. This is a plausible possibility which should have been borne out in the learned trial judge in his grounds of judgment. With regret this was not done. If we were to accept this possibility as mentioned above, it somewhat throws a different complexion to the entire case. We thus find the lack of
- e* application of the learned judge of this possible legal defence, a miscarriage of justice.

- f* We wish to emphasise here this is not the usual run of the mill case, when the police merely acted on a tip-off, by an informer, who is invariably not present, but is a case when the informer was not only present at the time of the arrest, but was in dialogue with the appellant prior to the arrest, and had dealing with the appellant as regards the hiring of the car prior to the arrest of the appellant. We are of the concerted view that Wong Lou Kat was essential to the unfolding of the narrative of the prosecution's case, and should have been called as a witness. The trial judge's rejection of the need to call him
- g* based on the fact that he was an informer, is in our view misplaced.

- h* There was also another infirmity in the judgment worth mentioning, and that is the defence version of events that it was not ASP Luthfi but PC Yap who had arrested the appellant. The trial judge in this respect had this to say in his grounds of judgment when reflecting this version of the defence:

- i* Bagi memperkuat ceritanya, tertuduh juga menyatakan bahawa ASP Luthfi tidak ada langsung di tempat kejadian dan orang yang menangkapnya ialah seorang anggota polis yang dikenalnya sebagai Yap. Kalaulah benar ceritanya, kenapa perlu Asp Luthfi berbohong kepada mahkamah, **kerana tidak ada bezanya dari segi undang-undang siapa yang menangkap tertuduh, samada**

Yap atau ASP Luthfi. (penekanan diberi). Yap sebagai seorang anggota polis mempunyai cukup kuasa untuk menangkap tertuduh. Dari itu saya tak nampak kenapa ASP Luthfi perlu mengatakan dia yang menangkap tertuduh jika sebenarnya dia tidak berbuat demikian seperti yang dikatakan oleh tertuduh. Oleh hal yang demikian saya memutuskan bahawa keterangan tertuduh semestinya ditolak sama sekali dan keterangan ASP Luthfi diterima tanpa sebarang keraguan.

We are of the view that it is an erroneous view to suggest, as the trial judge did, that it is immaterial as to who arrested, the appellant - whether ASP Luthfi or PC Yap. With respect, thus, we feel it tantamounts to riding rough shod over the evidence. To us it would matter as to who effected the arrest, as it would have a bearing on the prosecution's narrative. The fact that PC Yap was not called as a witness by the prosecution in this instance, but merely offered to the defence, would, we hold, have a material effect on the case for the prosecution.

Having examined the evidence led by the prosecution afresh, we find that the evidence left too many questions unanswered, especially the role of the so-called informer. In view of our reservation especially on the treatment of the defence case in the context of the alleged informer, and the fact there may have been a material gap in the prosecution case, we allowed this appeal, and set aside the order of conviction.

In our opinion, the justice of the case does not allow us to consider s. 60 of the Courts of the Judicature Act 1964 to sustain the conviction on the charge of trafficking.